STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2004
v	No. 248613 Monroe Circuit Court
TEMPY LEE BLACK, Defendant-Appellant.	LC No. 02-032045-FH

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of less than twenty-five grams of cocaine, in violation of MCL 333.7403(2)(a)(v), and maintaining a drug house, in violation of MCL 333.7405(1)(d). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 33 months to 15 years' imprisonment on both counts. We affirm defendant's convictions, but remand for resentencing.

Defendant first argues that the trial court erred in failing to suppress evidence[1] that was seized from a grill in his yard, because the grill was not specifically delineated in the search warrant and accompanying affidavit as an object to be searched. We disagree. We review de novo a trial court's ultimate decision on a motion to suppress. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

A defendant has the right to be free from unreasonable searches and seizures under both the federal and state constitutions. *People v McGhee*, 255 Mich App 623, 625; 662 NW2d 777 (2003); US Const, Am IV; Const 1963, art 1, § 11. Both the Michigan and United States constitutions provide that a warrant shall not be issued without particularly describing the place to be searched. *People v Hampton*, 237 Mich App 143, 150; 603 NW2d 270 (1999); US Const, Am IV; Const 1963, art 1, § 1; MCL 780.654.

> The test for determining whether the description in the warrant is sufficient to satisfy the particularity requirement is whether the description is such that the officers with a search warrant can with reasonable effort ascertain and identify the

[1] Specifically, forty-one individually-wrapped packets of crack cocaine and $766.

> place intended. *Steele v United States*, 267 US 498, 503; 45 S Ct 414; 69 L Ed 757 (1925); *United States v Gahagan*, 865 F2d 1490, 1496 (CA 6, 1989). The Fourth Amendment safeguard is designed to require a description that particularly points to a definitely ascertainable place so as to exclude all others. *Id*. Thus, the test for determining the sufficiency of the description of the place to be searched is (1) whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort, and (2) whether there is any reasonable probability that another premises might be mistakenly searched. *Id*. at 1496-1497. The requirement is designed to avoid the risk of the wrong property being searched or seized. [*Hampton*, *supra* at 150-151.]

Additionally, "[a] search warrant should be read in a common-sense and realistic manner." *McGhee*, *supra* at 626.

Here, the search warrant described the place to be searched as follows:

> 14941 Monroe Street, Township of Berlin, County of Monroe, State of Michigan. 14941 Monroe is described as a one story, single family dwelling constructed of tan siding. The residence is the second house south of Will Carleton and rests on the west side of the street. The residence front door faces east with the numerals 14941 affixed to the left of the front door. The search is to include a 1992 Buick two door bearing MI registration UZV330. The search is also to include the basement, garage, any building affixed to and any vehicle within the curtiledge [sic] of 14941 Monroe, Township of Berlin, County of Monroe, State of Michigan.

The search warrant described the property to be searched for and seized as:

> All suspected controlled substances, all items used in connection with the sale, manufacture, use, storage, distribution, transportation, delivery and/or concealment of controlled substances. All books, records and tally sheets indicating sales of controlled substances. All prerecorded Michigan State Police funds used to make purchases of controlled substances and any items obtained through the sale of controlled substances. All weapons and items establishing ownership, control, occupancy, or possession of the above-described place. Any and all assets and property related to narcotic trafficking.

The United States Supreme Court has explained:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal [drugs] also provides authority to open closets, chests, drawers, and containers in which the [drugs] may be found. [*United States v Ross*, 456 US 798, 820-821; 102 S Ct 2157; 72 L Ed 2d 572 (1982).]

Additionally, this Court has stated that "the Fourth Amendment is not violated by a search of the grounds or outbuildings within a residence's curtilage where a warrant authorizes a search of the residence." *McGhee*, *supra* at 633-634. For example, the Court of Appeals for the Fifth Circuit has held that a flower bed outside of a house was part of the residence and therefore subject to search. *United States v Anderson*, 485 F2d 239 (CA 5, 1973). Similarly, in the instant case, we find that the grill was properly searched as an item that fell within the scope of a lawful search of the premises described in the warrant, and the trial court properly denied defendant's motion to suppress the evidence.

Defendant next argues that the trial court abused its discretion when it allowed into evidence certain allegedly hearsay statements. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence." *Id*. We review such questions of law de novo. *Id*. Accordingly, when such preliminary questions of law are at issue, we must keep in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id*.

At trial, a police officer testified that while the search warrant was being executed, defendant's cell phone rang repeatedly, and when the officer answered it, the callers asked for "Blackie," and placed orders for twenty and forty dollar rocks of crack cocaine. Defendant argues that the callers' statements were hearsay that should have been excluded pursuant to MRE 801(c). We disagree.

MRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(a) defines "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion." Accordingly, speech that is not an assertion does not constitute hearsay. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 205; 579 NW2d 82, modified 458 Mich 862; 587 NW2d 637 (1998) (a command that is incapable of being true or false is not hearsay). The inquiries of the callers asking if "Blackie" was there were not assertions, because such inquiries could not be considered true or false. Similarly, the requests to purchase crack cocaine were not assertions, because such requests could not be considered true or false. With respect to the argument that the requests to purchase crack cocaine were implicit assertions that the callers wanted to buy crack cocaine, such an "implied assertion" does not constitute hearsay. *Id*. at 224-226.

Defendant also takes issue with the following testimony by a police officer:

> She [a female caller] said I need, I believe, it was 20. I said where you at? She says, I'm around the corner. I said, what are you driving? She said, I believe, it was a Bronco. . . . [T]he Bronco turned the corner and we converged on the vehicle to confront the individual who stated to me that she was going up the street to a friend's house, and there were other individuals in the car, and I asked what friend[?], and then she later said she was coming to that residence to buy crack cocaine.

As noted above, a caller's request for drugs is not an assertion, and therefore is not hearsay. *Jones*, *supra* at 205, 224-226. Additionally, the police officer's questions ("where you at?"; "what are you driving?"; and "what friend[?]") are not assertions, and therefore are not hearsay. *Id*. With respect to the caller's responses ("I'm around the corner" and "[I'm driving] a Bronco"), there is no indication that the utterances were offered at trial to prove the truth of the matter asserted; therefore, the caller's responses are nonhearsay. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993) ("where a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay").

Regarding the other contested statements, that the woman was going up the street to purchase drugs, and her later admission that she had been coming to defendant's house to purchase drugs, we agree with the prosecution that these statements were admissible under the exception to the hearsay rule set out in MRE 803(3), as a statement of the declarant's then existing state of mind or intent to purchase crack cocaine. *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995). The trial court did not abuse its discretion in admitting the police officer's testimony.

Defendant next argues that the trial court abused its discretion when it allowed into evidence testimony from a detective that the condition of defendant's house during the execution of the search warrant was so filthy that he was compelled to call protective services. However, the record reveals that defense counsel did not object to the complained-of testimony until after the prosecutor inquired as to the general condition of the household, and the detective gave the aforementioned response. The trial court then sustained the objection.

It is well settled that to be timely, an objection should be interposed between the question and the answer. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Moreover, the purpose of requiring objections to be timely is to give the trial court an opportunity to correct the error. *Id*. Accordingly, to avoid forfeiture of an unpreserved, nonconstitutional error, defendant bears the burden of establishing that it amounted to plain error affecting his substantial rights. *Id*.; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The fact that the objection was raised after the detective gave the objectionable testimony precludes finding an error on the part of the trial court. Had defense counsel posed a timely objection, the trial court would have had the opportunity to rule on the evidentiary issue, i.e., whether the evidence was relevant pursuant to MRE 401. Moreover, the trial court instructed the jury that when deciding the case, it should not consider evidence that had been excluded during trial. Considering the trial court's limiting instruction and the other evidence against defendant, we find that defendant has not met his burden of establishing that plain error affecting his substantial rights occurred. Accordingly, defendant has forfeited the issue on appeal.

Finally, defendant argues that the trial court erred in scoring ten points for offense variable 14 (OV-14) when calculating the legislative sentencing guidelines for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and maintaining a drug house, MCL 333.7405(1)(d), on the basis that defendant was a leader in a multiple offender situation. MCL 777.44(1)(a). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score," *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and "[s]coring decisions for which there is any evidence in support will be upheld." *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). "This Court shall affirm sentences within the guidelines range absent an

error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

We find that the trial court abused its discretion in scoring ten points for OV-14, where there was no evidence to support a finding that defendant was a leader in a multiple offender situation. At sentencing, the trial court ruled, over defense objection, that a score of ten points was supported by the evidence, on the basis that numerous people often frequented defendant's house, and defendant's wife and three children resided in the house. However, we agree with defendant that he was the sole offender in possessing less than twenty-five grams of cocaine and in maintaining a drug house, and find that he should have been scored zero points for OV-14. MCL 777.44(1)(b). Therefore, we remand for resentencing pursuant to MCL 769.34(10).[2]

We affirm defendant's convictions, but remand for resentencing.[3] We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter

[2] MCL 333.7403(2)(a)(v), possession of less than twenty-five grams of cocaine, and MCL 333.7405(1)(d), maintaining a drug house, are class G offenses. Defendant is a fourth-offense habitual offender, MCL 769.12, and was scored at PRV level D. With a score of zero points for OV-14 for both offenses, defendant has a total of five OV points, thereby reducing his OV level from II to I. As such, the appropriate sentencing guidelines range is 0 to 22 months' imprisonment.

[3] In light of our determination that defendant should be resentenced, defendant's argument concerning the United States Supreme Court's recent decision in *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is moot.